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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Geographic Partitioning and Spectrum)
Disaggregation by Commercial Mobile)
Radio Services Licensees)
)
Implementation of Section 257 of the)
Communications Act —)
Elimination of Market Entry Barriers)

WT Docket No. 96-148

GN Docket No. 96-113

To: The Commission

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REPLY COMMENTS OF THE AD HOC RURAL TELECOMMUNICATIONS GROUP

The Ad Hoc Rural Telecommunications Group ("RTG"), by its attorneys, hereby respectfully submits these Reply Comments in response to the Comments filed pursuant to the *Notice of Proposed Rulemaking* ("NPRM"), released by the Federal Communications Commission ("FCC" or "Commission") on July 15, 1996, in WT Docket No. 96-148 and GN Docket No. 96-113. These Reply Comments focus on the proposal to extend the ability to partition broadband personal communications services ("PCS") licenses to entities other than rural telephone companies, as proposed in the NPRM.

I. DISCUSSION

- A. **Eliminating the Rural Telephone Companies' Exclusive Right to Receive Partitioned PCS Licenses Would Violate the Mandate of Section 309(j)(3)(B) to Afford Rural Telephone Companies the Opportunity to Provide New and Innovative Services.**

In Section 309(j)(3)(B) of the Communications Act of 1934, as amended

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("Communications Act"),¹ Congress mandated that in structuring competitive bidding systems, the Commission must promote economic opportunities for a variety of applicants, including small businesses, to participate in the provision of new and innovative services. Despite this mandate, the existing partitioning rule has been the only specific "designated entity" preference which the Commission afforded to rural telephone companies.²

Declining to give rural telephone companies other economic incentives such as bidding credits or favorable payment plans, the Commission created the existing partitioning rules.³ The Commission adopted the partitioning rules to provide rural telephone companies an "enhanced opportunity to participate in the provision of broadband PCS and to deploy broadband PCS in their rural service areas rapidly."⁴ The Commission found that these rules would "encourage rural telephone companies to take advantage of existing infrastructure in providing PCS services, thereby speeding service to rural areas."⁵

Despite its obligations under Section 309(j), the Commission utterly failed to provide rural telephone companies a real economic opportunity to provide PCS through the auction

¹ 47 U.S.C. Section 309(j)(3)(B).

² Comments of Illuminet and the Independent Alliance ("Illuminet") at 3-4; Comments of Century Personal Access Network, Inc., ("Century") at 4-5.

³ See, *In re Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5597-99 (1994) ("*Fifth R&O*").

⁴ *Id.* at 5597

⁵ *Id.* at 5598

process.⁶ Contrary to the Commission's stated expectation, but in accordance with its rules, "deep-pocketed" firms drove rural telephone companies from the winning rounds.⁷ Century calculates that a mere three rural telephone companies won C block PCS licenses.⁸ Now, by proposing to deny rural telephone companies their exclusive right to acquire partitioned licenses, the Commission intends to remove the one remaining shred of opportunity that rural telephone companies realistically have to enter the PCS market.

History indicates that increasing the number of eligible entities will not enable rural telephone companies and other small businesses to acquire partitioned licenses. Despite the existing exclusive partitioning right of rural telephone companies, large PCS licensees have been uninterested in negotiating with individual rural telephone companies. PCS licensees would prefer to partition off large blocks of less desirable territory to one entity rather than negotiate with a number of rural telephone companies seeking to provide PCS service to their traditional wireline customers.

Contrary to the conjecture of Western Wireless Corporation ("Western Wireless"),⁹ members of RTG are actively attempting to negotiate with PCS licensees for partitioning rights. Unfortunately, to date, these attempts have met with little interest. The bargaining

⁶ See Comments of United States Telephone Association ("USTA") at 2; Century at 7-8; Comments of the National Telephone Cooperative Association ("NTCA") at 4; Illuminet at 5-6.

⁷ See NTCA at 4; Century at 7-8; Illuminet at 5-6.

⁸ Century at 9. USTA's argument that modifying the partitioning rules will benefit rural telephone companies that have won licenses by providing those companies with additional capital, is accordingly of very limited applicability. See USTA at 2.

⁹ Comments of Western Wireless at 4.

power of rural telephone companies will be further eviscerated if PCS licensees can partition any size geographic area to any entity. There will simply be no incentive to negotiate with rural telephone companies.

USTA correctly notes that if the Commission rescinds its existing partitioning rules, "rural telephone companies are likely to be financially excluded from obtaining spectrum to serve their traditional service areas."¹⁰ As they did in the auctions, deep pocketed companies will once again drive rural phone companies from their own service areas.

A number of Commenters argue that rural telephone companies will be able to acquire partitioning rights in areas outside their traditional service areas. Once again, history and common sense indicate otherwise. Rural telephone companies, lacking existing infrastructure and economies of scale outside of their telephone service areas, and lacking substantial financial backing, will find it difficult to take advantage of this illusory opportunity. Many rural telephone companies will not have a realistic opportunity to operate outside of their service areas. The difficulties are further exacerbated by uncertainties in the ultimate resolution of the universal service support system.¹¹ In any event, even assuming that the ability to acquire partitioned licenses in areas outside their traditional service areas would benefit rural telephone companies, any such benefit would be greatly outweighed by their practical inability to obtain partitioned licenses within their own service territory.

The proposed rules will benefit large PCS licensees who will be able to partition large undesirable areas to a single entity. The proposed rules will not benefit small entities and will

¹⁰ USTA at 2.

¹¹ *Federal-State Joint Board on Universal Service*, CC Docket 96-45.

actively harm rural telephone companies.

B. The Commission Is Estopped From Changing Its Rules in the Middle of the PCS Licensing Process to the Detriment of Rural Telephone Companies.

Having found themselves at a substantial disadvantage in the auctions and relying on the Commission's partitioning rules, many rural telephone companies adopted business plans which had them refrain from participating in the upcoming D, E, and F Block PCS auctions, opting instead to provide PCS through their exclusive right to acquire partitioning rights in the geographic areas they currently serve.¹² To RTG's amazement, the Commission released the NPRM only 14 days before the July 29, 1996, deadline for filing an application to participate in the upcoming auctions.

The NPRM proposes fundamental changes to the PCS regulatory environment where rural telephone companies are concerned. Fourteen days was simply not a reasonable amount of time in which to modify business plans, secure financing and formulate a bidding strategy. RTG agrees with Century, Illuminet and NTCA that the timing of the Commission's proposed modification unfairly and singularly harms rural telephone companies.¹³ This about face in midstream is repugnant to the principles of a fair and ordered regulatory regime.

Commissioner Susan Ness was wise to warn of the dangers of "substantial modification of [Commission] rules in mid-stream--after some but not all of the licenses have been auctioned, and before the licensees have had a chance to implement the business plans

¹² Century at 7-8; Illuminet at 4; NTCA at 5.

¹³ Century at 7-8; Illuminet at 4-5; NTCA at 5.

pursuant to which they bid for their licenses."¹⁴ Commissioner Ness correctly stated, "[A]bsent compelling need, our rules should remain in place at least through initial construction periods."¹⁵ The Commission should heed these warnings and retain the existing partitioning rules.

C. A Right of First Refusal Does Not Adequately Satisfy the Commission's Obligations, But Should Be Adopted If the Commission Expands Partitioning Eligibility.

A number of parties advocate allowing rural telephone companies a "right of first refusal" to acquire a partitioned license in the geographic area that they currently serve as an alternative to rural telephone companies' current exclusive right.¹⁶ While a right of first refusal is better in theory than a complete reversal of the Commission's rules, such a right in reality does not satisfy the Commission's obligations under Section 309(j) or remedy the virtually *ex post facto* shift in the Commission's rules. As a practical matter, a right of first refusal will be extremely difficult to implement and will be easy to avoid by those licensees wishing to partition large geographic areas.

While a right of first refusal is inadequate, it is the Commission's only avenue to remain marginally compliant with Section 309(j) of the Communications Act. Therefore, should the Commission extend partitioning eligibility to other entities it should allow rural

¹⁴ NPRM, Separate Statement of Commissioner Susan Ness ("Statement of Commissioner Ness").

¹⁵ *Id.*

¹⁶ USTA at 3; Comments of the Rural Cellular Association ("RCA") at 4; NTCA at 6.

telephone companies a right of first refusal which affords them the right to acquire a partitioned license on terms at least as favorable as those offered to any other entity.

D. Excluding Rural Telephone Companies from Providing PCS Will Prevent or Delay the Introduction of PCS to Rural Populations.

The Commission seeks to allow unlimited partitioning in the interest of increasing the number of competitors and improving spectrum efficiency.¹⁷ While Congress generally encourages increased competitive opportunities and spectrum efficiency, Congress in the 1996 Act recognized that increased competition does not necessarily translate into greater service to the public in rural areas.¹⁸ In the *Fifth R&O*, the Commission correctly concluded that rural telephone companies are in the best position to provide PCS to rural populations at the earliest opportunity.¹⁹ In adopting the current partitioning provisions, the Commission concluded, "We believe that rural partitioning is an efficient method of getting a license in the hands of an entity that will provide rapid service to the rural areas."²⁰ This situation has not changed, and no commenter genuinely familiar with the realities of rural telecommunication provision and representing the interests of rural telecommunications providers has submitted

¹⁷ See NPRM at par. 2

¹⁸ See USTA at 5; 47 U.S.C Section 251(f).

¹⁹ See also, RCA at 4 ("Service to sparsely-populated areas can be provided most promptly by those entities with existing infrastructure in the service area."); 3 Rivers PCS, Inc. and Montana Wireless, Inc. ("3 Rivers") at 2-3; Illuminet at 3-4.

²⁰ *Fifth R&O* at para. 152

evidence disputing this conclusion.²¹ Even RCA, who argues for a very limited expansion of partitioning eligibility notes, "Both Congress and the Commission have recognized that the public interest is fostered in rural areas by adopting measures that encourage deployment of technology and advanced services in rural areas by carriers that have made a demonstrable investment and commitment to this objective."²²

PCS licensees will probably focus their efforts on lucrative urban areas. There will be unnecessary delays while these PCS licensees shop partitioned areas to the highest bidders. In addition, without an existing infrastructure, or a commitment to serve rural populations, new entrants may never provide service to remote regions of the partitioned areas. Certainly, delays will be great. The Commission should not gamble at the expense of the rural public when it has no basis for modifying its sound conclusion in the *Fifth R&O*.

The Commission must balance its obligations under the Communications Act and the public interest benefits of ensuring prompt delivery of PCS to rural populations, against its desire to generate auction revenues and to encourage additional providers to enter various markets. In this case, both Congressional mandate and fairness dictate that the Commission maintain its existing partitioning rules.

²¹ RTG takes issue with the Comments of the National Rural Telecommunications Cooperative ("NRTC"), which, in supporting the Commission's proposal, purport to represent the interests of its rural telephone company members. NRTC is overwhelmingly composed of electric cooperatives (521) and through its affiliates distributes direct broadcast satellite ("DBS") service. NRTC in its Comments does not accurately reflect the position of its rural telephone company members. Members of RTG that are also members of NRTC do not advocate NRTC's position to open up partitioning to everyone. (*See* NRTC at 4) In addition, NRTC clearly is interested in acting as a partitioning clearinghouse. It is placing its self-interest as a trade association before the interest of its rural telephone company members.

²² RCA at 3.

II. CONCLUSION

The Commission's partitioning proposal would effectively preclude rural telephone companies from participating in the provision of PCS and would delay the introduction of PCS to rural areas. The proposal would violate the Commission's obligations under the Communications Act to ensure that rural telephone companies receive sufficient opportunities to participate in the provision of new and advanced telecommunications services and would unfairly harm rural telephone companies who have relied on the current rules in fashioning their PCS entry plans.


RTG respectfully requests that the Commission reject the proposed partitioning plan and allow rural telephone companies an exclusive right to receive partitioned licenses in the geographic areas they currently serve. If the Commission does modify its partitioning rules to allow additional entities to acquire partitioned PCS licenses, the Commission should allow

rural telephone companies a right of first refusal to provide PCS to the geographic areas they traditionally serve.

Respectfully submitted,

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Certificate of Service

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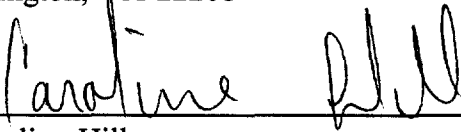
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